

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 13-CR-607

-against- US District Court  
Central Islip, NY

PHILLIP KENNER and  
TOMMY CONSTANTINE, September 2, 2014  
1:50 pm

Defendants.:

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Dominick M. Tursi, CM, CSR  
Official US District Court Reporter

1 (Call to Order of the Court. Appearances noted  
2 as indicated above.)

3 THE COURT: Both Mr. Kenner and Mr. Constantine  
4 are present.

5 As you know, we scheduled this as a status  
6 conference. And, in addition to being cc'd on various  
7 discovery letters, I did receive the government's August  
8 29 letter raising at least two outstanding discovery  
9 issues. So we can address those and any other issues that  
10 anyone wants to bring up.

11 Why don't we start with the two issues raised in  
12 the letters. I don't know if Mr. Conway or Mr. Haley  
13 wants to explain what the issue is.

14 MR. HALEY: I would be happy to, your Honor.

15 When you say the two issues, are you speaking of  
16 the issue regarding the desire that my client have  
17 returned to him his laptop computer?

18 THE COURT: That is one. And the other one is  
19 seeking the identification of the victims who were named  
20 in the indictment. Those are the two that the government  
21 highlighted.

22 MR. HALEY: Yes, judge.

23 By way of, I guess, background, your Honor, I  
24 know your Honor makes a point of staying on top of every  
25 case. If your Honor has reviewed the docket sheet since

1 our last appearance in court, because there are a number  
2 of Rule 16 demands on my part that I will address in a  
3 moment because I know that is not the focus of your  
4 Honor's current question, there was, as indicated in this  
5 correspondence between myself and the government, an issue  
6 we were trying to resolve as related to the information  
7 contained on my client's laptop computer which was seized  
8 pursuant to a search warrant.

9 As reflected in that correspondence, I had  
10 proposed a solution by which the laptop would be returned  
11 to my client: I would agree to a broadly based  
12 stipulation to resolve any issues that may arise in  
13 connection with the evidentiary use of the information  
14 contained on that laptop.

15 I suggested that early on, after our last court  
16 appearance, because, as I recall, when I brought the issue  
17 to the attention of your Honor, your Honor suggested that  
18 we work cooperatively with the government to try to  
19 resolve the issue.

20 As set forth in one of my letters, I did make  
21 efforts to try to come up with a solution by which the  
22 government retain the laptop computer and I would be able  
23 to then, through the use of an expert witness, obtain a  
24 model laptop computer, the same model number, the same  
25 software program, to try to take the burden on, judge, if

1 you will. When I say take the burden on: for the defense  
2 to solve the problem if we are not going to be given the  
3 laptop computer.

4 Judge, really that is academic from my  
5 standpoint because I believe the issue has changed. I  
6 believe the issue has changed as a result of a decision  
7 rendered by the Second Circuit in June of this year. That  
8 decision is entitled *United States v Ganas*, 755 F.3d 125.  
9 And it was actually a decision which I believe, judge,  
10 really addresses this issue.

11 It was not based upon a Rule 16 discovery  
12 request for return of an original laptop computer or, if  
13 you will, the information contained on the original laptop  
14 computer by way of a Rule 16 discovery demand, but by way  
15 of a Fourth Amendment analysis.

16 The point is simply this, Judge. If the court  
17 takes a look at *Ganas*, what we have is a circumstance  
18 where the agents went into the location with the  
19 authority, pursuant to a search warrant, to seize  
20 information contained on a computer.

21 What they did at the location, judge, is, they  
22 mirror-copied the hard drive of that particular computer;  
23 left the computer with the defendant, it was his computer,  
24 but mirror hard-copied the information contained on the  
25 computer, which contained information arguably relevant to

1 the prosecution but also contained a great deal of  
2 personal information.

3 The government held on to that information for  
4 an extended period of time though there were requests that  
5 information of a personal nature be returned to the  
6 defendant. The government didn't do so.

7 It went up to the Circuit, and the Circuit found  
8 that under those circumstances there was a Fourth  
9 Amendment deprivation; that the government had no  
10 authority, by way of constitutional law or by way of  
11 statutory law, to retain all that information in its  
12 possession.

13 Judge, what I think is salient in that decision,  
14 because there absolutely has been a dispute between myself  
15 and the government as to whether or not they are really  
16 prejudiced; if they return the laptop computer to my  
17 client, I respectfully submit to your Honor I'm not a  
18 computer expert but they have made a mirror copy of this  
19 hard drive.

20 They have all the information already in their  
21 possession by virtue of making that mirror hard copy of  
22 the hard drive. As a matter of fact, some Rule 16  
23 material we received to date has come off of that hard  
24 drive from that laptop computer.

25 What the Circuit had to say is as follows.

1     *"Today, advancements in technology enable the government*  
2     *to create a mirror image of an individual's hard drive,*  
3     *which can be searched as if it were the actual hard drive*  
4     *but without interviewing with the individual's use of his*  
5     *own computer or files."*

6             So the current application, Judge, from my  
7     position, is really quite simple. This computer, laptop  
8     computer, contains the information arguably relevant to  
9     the prosecution of the case. There is no question it also  
10    contains personal information, a great deal of personal  
11    information, as relates to my client. That item, the  
12    laptop itself, in view of the fact that the government has  
13    already obtained the information they need by way of the  
14    hard drive, ought to be returned to my client.

15            I might add, judge, it is also our position that  
16    not only should his laptop be returned but his iPhone  
17    should be returned.

18            Through the Rule 16 discovery we have received  
19    snippets of emails that the government has provided to us  
20    that have come off of the iPhones. The iPhone also  
21    contains significant amounts of personal information.  
22    They are obviously able to copy electronically the  
23    information contained on those documents.

24            Judge, I might add we are talking about the  
25    Federal Bureau of Investigation. We are talking about a

1 law enforcement agency that has the technical wherewithal  
2 as well as the financial wherewithal to engage the experts  
3 to get a mirror hard drive of that laptop, which they have  
4 already obtained.

5 THE COURT: Okay. I understand that issue.

6 I want to ask the government to speak to that.  
7 But do you want to cover the second issue as well, the  
8 victim-identification issue?

9 MR. HALEY: Yes, sir.

10 I cited in an earlier email to the government  
11 two cases, Second Circuit cases, wherein the Circuit by  
12 way of a demand for a bill of particulars deemed it  
13 appropriate to identify the names and addresses of --  
14 excuse me. Yes, actually it was the names and addresses,  
15 I believe, of the victims in a particular case.

16 Those two cases indicated that the vehicle by  
17 which such a demand could be made was a demand for a bill  
18 of particulars. I stylized my letter in terms of that  
19 type of demand, the demand for a bill of particulars.  
20 Judge, because there is a reality here, and I understand  
21 that reality. I mentioned it in my letter. We may have  
22 already identified each of the John Does.

23 For purposes of the record, judge, from our  
24 perspective, judge, Brian Berard is John Doe One.

25 Michael Pecca is John Doe Two.

1 Owen Nolan is John Doe Three.

2 Darrell Sidor is John Doe Four.

3 Glen Murray is John Doe Five.

4 Sergei Gonchar is John Doe Six.

5 Mattias Norstrom is John Doe Seven.

6 Steven Rucchin is John Doe Eight.

7 Joe Juneau is John Doe Nine.

8 Greg DeVires, John Doe Ten.

9 Jay McKee is John Doe Eleven.

10 Ethan Moreau is John Doe Twelve.

11 Tyshon Nash is John Doe Thirteen.

12 John Kaiser, who is present in court, Judge, he  
13 is seated in the second row, has been here for each court  
14 appearance, he is certainly entitled to be so, he is here,  
15 he is John Doe Fourteen.

16 Nick Privitelo is John Doe Fifteen.

17 Kenneth Jowdy is John Doe Seventeen (sic).

18 Vincent Tesorio is John Doe Eighteen.

19 Now, to the extent that the government is  
20 prepared to acknowledge that we have correctly identified  
21 the John Does for purposes of my representation as to who  
22 we believe the John Does is to be, if they can make that  
23 representation to the court, this becomes less of an issue  
24 but not entirely, and I will get to that in a moment.

25 Judge, there is going to be a point in time when



1 I am going to have to open up to a jury. I will be using  
2 allegations that are contained in that indictment when I  
3 speak to that jury, and I want to be able to say to the  
4 jury and identify each of these John Does so the jury is  
5 not left with some shell game in their mind as to who  
6 specifically alleged what on what occasion with respect to  
7 the multiple counts obtained in that indictment.

8 I might add, Judge, the reason I mention these  
9 names to your Honor is, we have been in possession of  
10 those names for some period of time. If there is any  
11 allegation whatsoever that there has been an effort on my  
12 part, on the part of an investigator employed by us, on  
13 the part of my client, to in any way intimidate these  
14 witnesses such that we are looking for them to suborn  
15 perjury or anything of that nature at trial: Absolutely  
16 not.

17 And I would like to say, Judge, this is not an  
18 organized crime case. This is not an MS-13 case. But it  
19 has relevance and materiality that the defendant be  
20 allowed to know specifically who his, if you will,  
21 accusers are as relates to each John Doe as listed in that  
22 indictment.

23 I might add, judge, that certainly as far as Mr.  
24 Kaiser is concerned, he is not worried about his personal  
25 safety. He has given interviews to the news media, both

1 he as well as Brian Berard, alleging my client stole money  
2 from them, making all sorts of allegations. So they bask  
3 in the spotlight of the press, and yet can it truly be  
4 argued that somehow revealing the names or confirming the  
5 names to the defense in this action is somehow put them in  
6 jeopardy?

7 The final reason, Judge, it is important to me,  
8 and it will become an issue, judge, it is our intent at  
9 the appropriate time to serve Rule 17 subpoenas. As I  
10 indicated in one of my letters to the government, it  
11 strikes me we don't need the address of all those John  
12 Does. We have pared down the list as to who we would be  
13 interested in serving Rule 17 subpoenas on.

14 As your Honor is well aware, I'm CJA counsel.  
15 These subpoenas would be presented to your Honor for  
16 review. They are presented to the marshals service for  
17 service. In an effort to move this case along, judge, it  
18 strikes me that it is only appropriate that we have  
19 accurate addresses so we don't waste time and these  
20 subpoenas get served to have marshals service come back to  
21 your Honor and then ultimately me say: Look. He is no  
22 longer at that address.

23 So this has relevance and materiality, judge, in  
24 connection with the preparation of the defense in terms of  
25 the Rule 17 material.

1 I believe those are the two issues, your Honor.

2 THE COURT: All right. Let me deal with those  
3 and then I will address any other ones.

4 Do you want to add anything to that?

5 MR. CONWAY: No, judge. Just that in terms of  
6 the computer, I am not joining in that motion.

7 But in terms of the John Does, we join in Mr.  
8 Haley's motion.

9 THE COURT: Does anyone want to address those  
10 two issues?

11 MR. MISKIEWICZ: Yes, your Honor.

12 Your Honor, as to the issue of returning the  
13 laptop at this time. I will just, in summary, say that  
14 this is not the *Ganias* case. In that case the government  
15 was in possession of a laptop for two and a half years.  
16 It was in the process of or actually sought a second  
17 search warrant that expanded what it was able to view in  
18 that receptacle of data. And that is really the narrow  
19 issue that the Second Circuit had to address, is whether  
20 or not the seizure arguably took place at a later time as  
21 opposed to an earlier time.

22 Here the laptop has been in our possession for a  
23 number of months. More importantly to the government's  
24 prosecution team, we haven't even gotten possession of it.  
25 We have not even begun the Rule 41E search of documents

1 because the Sixth Amendment concern that there are  
2 privileged documents on that receptacle of data, if you  
3 will, that box full of documents, may contain privileged  
4 information that frankly we shouldn't be able to see and  
5 maybe even the codefendant Mr. Constantine shouldn't be  
6 able to see.

7 We have been working through that as  
8 expeditiously as possible. There is a walled-off group of  
9 agents and an AUSA supervising that, and I'm advised that  
10 that review has found something like 60,000 files  
11 totalling something like 300,000 pages of documents, and  
12 they are working as quickly and in as good faith as  
13 possible, as expeditiously as possible, to finish that  
14 review. But that never was an issue in the *Ganias* case,  
15 and here it is.

16 Secondly, we don't have one defendant, as in the  
17 *Ganias* case. We have two. So although it may be the case  
18 that Mr. Haley and his client are prepared to offer some  
19 broad stipulation, I don't know how Mr. Conway and his  
20 client can offer the same stipulation as to authenticity  
21 and maybe even waive objections to foundation arguments  
22 when they, like the prosecution team, haven't even been  
23 able to see what it is that we purport is relevant and  
24 seized pursuant to that search warrant.

25 Finally, and I think this is critical, many of

1 the issues that Mr. Haley is complaining about, overbreath  
2 or personal documents, et cetera, I submit will probably  
3 get resolved as a part of this privilege review.

4 In other words, the privilege team will submit  
5 to Mr. Haley, and I believe to the court simultaneously, a  
6 list of files that they believe are not privileged and  
7 therefore discoverable to the prosecution and discoverable  
8 to Mr. Constantine. There may be other documents where  
9 there will have to be some differences of opinion, and  
10 ultimately the court will have to decide. And I think  
11 that that will be the appropriate time for Mr. Haley to  
12 say the government should under no circumstances view the  
13 following. And that will forever more resolve the issues  
14 in *Ganias* about overbreath of the warrant.

15 THE COURT: In terms of solving this issue about  
16 his access to it, in your letter there is reference to him  
17 getting a computer through the national litigation support  
18 office. Is that your proposal for what the solution  
19 should be?

20 Even if they don't give him back the original  
21 hard drive, obviously Mr. Haley and his client want to  
22 have access to what is on there and are having issues I  
23 guess with what is being provided to them.

24 MR. MISKIEWICZ: That issue seems to have  
25 morphed, if you will, over the last several days and, to

1 my knowledge, since the last status conference.

2 First of all, it was our understanding that Mr.  
3 Haley would be unable to view the documents that we turned  
4 over in the mirror-imaged format because they were created  
5 on an Apple system and they only have access to a  
6 Microsoft system. Apparently, that is not the case.

7 Also, apparently he has the ability to view that  
8 material. In fact, I'm advised that our privilege-review  
9 team is reviewing all of this material on a Microsoft  
10 system. We don't have Apple in the government.

11 So there doesn't seem to be this inability to  
12 cross over platforms. If that were simply the case, that  
13 would certainly be a problem and I would understand his  
14 need to see the original. But apparently, I have  
15 confirmed with Mr. Haley, he was able to finally locate  
16 whatever software it was that was necessary to review  
17 certain documents. Some of the documents, I'm told again  
18 from the privilege review, are PDF files and Microsoft  
19 Word files.

20 So if it is a matter of actually seeing the  
21 documents, giving back the original evidence is not  
22 necessarily the only solution. If it is a matter of  
23 preserving the evidence, however, I submit that there is a  
24 process of going through it deliberately, and maybe we  
25 will get to a point where we can turn over the original

1 back to Mr. Haley.

2 But I submit, your Honor, we are not there now.  
3 And once we turn it over, I don't know how your Honor  
4 enters a protective order that says Mr. Kenner cannot  
5 touch it, or at least one that is enforceable. And if  
6 that is the case, we may have a situation, and this is  
7 also principally our reason for being hesitant about  
8 merely turning over an original piece of evidence; there  
9 may be items there that cannot be reconstructed through  
10 the image copy. I'm told, for instance, the mirror copy  
11 does not have the application software that is in the  
12 original, and there may come a time when that application  
13 software, particularly having to do with forged documents  
14 and forged texts, might become critical.

15 It is also the case that, and I have had this  
16 experience in lots of complex litigations where documents,  
17 once copied and recopied, become corrupt. And although it  
18 is easy at this stage for Mr. Haley to say just give it  
19 back and we will deal with the problems as they arise  
20 later on with some all-encompassing stipulation, again  
21 cocounsel and codefendant may not agree, and if there is a  
22 document on that hard drive that Mr. Constantine recalls  
23 that doesn't turn up on a mirror image, we no longer have  
24 the original to look at and now we are into an issue of  
25 spoliation and Sixth Amendment concerns of destruction of

1 Brady evidence.

2 So for all those reasons, your Honor, I simply  
3 ask the court's indulgence again to allow us to go through  
4 this process.

5 THE COURT: How much longer is the privilege  
6 review process? Do you know?

7 MR. MISKIEWICZ: I'm advised that they should  
8 have, if not by the end of the month certainly by October  
9 15, a list to counsel about what they deem to be  
10 privileged or not privileged.

11 THE COURT: Okay. Can you move now to the  
12 victim-identification issue.

13 MR. MISKIEWICZ: Just very briefly. We are  
14 unsure as to whether or not this is a bill of particulars,  
15 and if it is, clearly counsel has articulated a number of  
16 names which would suggest he doesn't need a bill of  
17 particulars. He claims he knows who those individuals  
18 are. So therefore the next question is whether or not  
19 this is something that would be, or additional  
20 documentation that would be, discoverable under Rule 17C,  
21 and the Bowman Dairy and Nixon standards would have to  
22 come into play. And at that point we would like to be  
23 able to, at the very least, be able to put in that counsel  
24 is seeking to subpoena from individuals that he believes  
25 to be witnesses in this case.



1           There is no question at some point the John Does  
2           are going to be identified to the jury and to cocounsel  
3           and to the court. There will be 3500 material that will  
4           make it plain. But we are a long ways away from that.  
5           And putting, just contending that I need this because of,  
6           on the grounds of a bill of particulars, without even  
7           arguing or filing a motion or application to the court  
8           which we would have an opportunity to respond to and then  
9           saying: *Well, what we really want is a Rule 17 subpoena,*  
10          makes it impossible for us then to really respond I think  
11          in any meaningful way.

12                 THE COURT: Let me say --

13                 MR. MISKIEWICZ: I would suggest that if he  
14           wants to file a bill of particulars, he should be given a  
15           filing schedule to do so. Or if there is a subpoena that  
16           he seeks documentary evidence from various individuals,  
17           that also be given the opportunity to join the issues  
18           after seeing if it is discoverable.

19                 THE COURT: There are two issues here.

20                 To the extent that he is seeing a Rule 17  
21           subpoena for additional documents from any of the victims,  
22           I agree with you, obviously he would have to do that by  
23           formal motion and I would have to see exactly what he is  
24           seeking.

25                 But to the extent he is seeking a more basic

1 list of the names of the victims, forget about their  
2 addresses for now because that would be contingent upon  
3 whether or not there is any basis to subpoena for  
4 anything, or whether or not they would not accept service  
5 absent being given their addresses.

6 But just a list of names, I guess I don't  
7 understand. I can make them file a motion for a bill of  
8 particulars on that. But it is clear to me that he would  
9 be entitled to those names prior to the trial and that the  
10 only basis for withholding them even at this juncture  
11 would be if there was a safety reason to do that, at which  
12 time I would set a date by which he would have to  
13 disclose, 30 days before we go to trial, 60 days before  
14 the trial; I don't know that what date would be.

15 But I don't know that this is one of those  
16 cases, for the reasons that I think Mr. Haley indicated,  
17 which are twofold. One is, part of your argument is they  
18 don't need the names because they have them already. So  
19 even if they have them already, then whatever safety issue  
20 you may be concerned about is moot.

21 But the second issue is that I don't know of any  
22 particular safety issues. I know you have summarized some  
23 conversations that the government said took place between  
24 Mr. Kenner and one or more of the victims, but I'm not  
25 sure that you have made a sufficient showing at this

1     juncture, with Mr. Kenner incarcerated, that that is a  
2     sufficient reason for me to delay disclosure of just the  
3     names so that they can begin preparing for the trial.

4             I don't want them to, if, say, you disclose this  
5     30 days before trial and they say Judge, that is not  
6     enough time, we need an adjournment of the trial because  
7     until we know who the victims are it is difficult for us  
8     to prepare. So this is the way I am looking at it. And  
9     to the extent they just want a list of names of the  
10    victims, unless the government is going to try to  
11    articulate to me a compelling basis for delaying that, I'm  
12    going to tell you that you should turn over that list now  
13    or confirm that the list that he just read off is  
14    accurate. If you want to, do that today in court. But  
15    you can't do this through a letter to him.

16            But to the extent that he is seeking their  
17    addresses or seeking any documentation from them, that he  
18    should do by formal motion. So I will leave the option  
19    of, if you want to argue that I should delay the  
20    disclosure of the names, you should submit a letter within  
21    one week of today explaining to me why we should do that.  
22    Otherwise, within one week of today the names should be  
23    turned over to counsel. Okay?

24            MR. MISKIEWICZ: Understood.

25            THE COURT: On the first issue, Mr. Haley.

1 First let me ask Mr. Conway.

2 You are being drawn into the motion in terms of  
3 whether or not you and your client would stipulate. I'm  
4 not sure this is dispositive of the motion, but at this  
5 point are you willing to stipulate to the authenticity of  
6 anything the government recovers from the mirror image of  
7 the hard drive?

8 MR. CONWAY: I can't at this time, your Honor,  
9 because I'm in the dark. I don't know what is on there.  
10 Obviously, I haven't had an opportunity to see anything.  
11 And until their review is done and I can see what is on  
12 there, I can make certain decisions and make certain  
13 challenges at that time, but at this time I can't make any  
14 representation whatsoever.

15 THE COURT: So Mr. Haley, I don't want to spend  
16 too much time on this, but if you want to make a motion  
17 for return of property, or however you want to style it,  
18 you can do that. But I will say to you right now it seems  
19 to me that, in light of the absence of a full stipulation  
20 from everybody who potentially would be involved in the  
21 documents that are recovered, and in light of the fact  
22 that they are still doing a privilege review, that any  
23 attempt to get a return of that computer would be  
24 premature.

25 I would being shocked if you can find any case

1 where, under those type of circumstances, the government  
2 has been required to return the original computer when  
3 there is not a full stipulation about the authenticity of  
4 it and they are still undergoing a privilege review. It  
5 seems very premature.

6 But let me ask you because now I'm confused.  
7 Are you having issues accessing the mirror image or not?

8 MR. HALEY: Yes, your Honor.

9 If I may, and I will be brief. The issue, your  
10 Honor, and I anticipated your Honor may want it, and I  
11 would invite your Honor because it will be probably the  
12 only case I cite in my brief to the court, to take a look  
13 at that *Ganias* case that I cite, your Honor, on the record  
14 because I believe that clearly addresses the issue.

15 Judge, we are really just mixing apples and, I  
16 won't say oranges; we are mixing apples and PC-based  
17 computers here. The issue is this. We were delivered two  
18 terabyte hard drives which the government claims is a  
19 mirror image of the hard drives on my client's computer.  
20 It is those two terabyte hard drives that have been  
21 delivered to my client that, when he tries to access the  
22 information on the PC-based computers at the Queens  
23 Private Correctional facility, where he is incarcerated,  
24 he is unable to fully access that material. He can access  
25 some, I'm told, but a very small amount of it, probably